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## WISCONSIN LEGISLATIVE COUNCIL

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Terry C. Anderson, Director

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TO: REPRESENTATIVE AMY LOUDENBECK

FROM: Anna Henning, <sup>Att</sup> Senior Staff Attorney

RE: Eminent Domain Authority and Determinations of Necessity

DATE: June 29, 2017

This memorandum responds to your request for an overview regarding the purposes for which governments and private entities may exercise the power of eminent domain in Wisconsin and the process for determining whether a given condemnation is necessary.<sup>1</sup> You also requested a discussion of those subjects as applied to railroads in particular.

### PURPOSES FOR WHICH PROPERTY MAY BE CONDEMNED

Wisconsin law empowers a range of entities to condemn private property for public use. Counties, towns, villages, cities, school districts, and certain state entities have the broadest authority; with limited exceptions, the Wisconsin statutes authorize those governmental entities to exercise condemnation authority for "any lawful purpose." [s. 32.02 (1), Stats.] Other entities, including certain types of private entities, may exercise condemnation authority for more limited purposes set forth in ch. 32, Stats.

In addition to statutory limitations, Article I, Section 13 of the Wisconsin Constitution and the Takings Clause of the Fifth Amendment to the U.S. Constitution limit the purposes for which an entity may exercise the power of eminent domain. Those constitutional provisions prohibit the taking of property "for public use without just compensation." Generally, the phrase "public use" has been interpreted more narrowly under Article I, Section 13 of the Wisconsin Constitution than under the Fifth Amendment to the U.S. Constitution. In Wisconsin, "public use" requires that condemned property will be actually possessed by the public; it is not

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<sup>1</sup> For more a more detailed summary regarding statutory authority and procedures governing eminent domain, see Wisconsin Legislative Council IM-2014-06, *Eminent Domain: Statutory Authority and Procedures*, [https://docs.legis.wisconsin.gov/misc/lc/information\\_memos/2014/im\\_2014\\_06](https://docs.legis.wisconsin.gov/misc/lc/information_memos/2014/im_2014_06).

sufficient that the public will receive "incidental benefits" from condemnation. [*David Jeffrey Co. v. City of Milwaukee*, 66 N.W.2d 362 (Wis. 1954).]

### DETERMINATIONS OF NECESSITY

An entity seeking to condemn property must follow certain procedural steps, which are generally set forth in ch. 32, Stats. One key step in the process is the determination of necessity.

Before a condemnation may proceed, it must be determined to be necessary. Generally, "necessity" in this context "is not limited to takings that are absolutely or indispensably necessary." Instead, takings must be "reasonably necessary, reasonably requisite and proper for the accomplishment of the public purpose for which the property is sought." [*Falkner v. Northern States Power Co.*, 248 N.W.2d 885, 894 (Wis. 1977).]

Wisconsin law empowers most state and local government entities, as well as specified private entities, to determine the necessity of the condemnations they pursue. The Public Service Commission determines the necessity of proposed condemnations involving a large electric generating facility, high-voltage transmission line, or undeveloped water power site. For all other condemnations, a determination of necessity is made by the circuit court in the county in which the property is located. [s. 32.07, Stats.]

Wisconsin courts have been relatively deferential when reviewing challenges to determinations of necessity. Although a person may bring a court action to contest a condemnation on the basis of the determination of necessity, in various judicial decisions, courts have made clear that the scope of their review is narrow and that a determination of necessity will be upheld unless there is a showing of "fraud, bad faith, or a gross abuse of discretion." [*Kauer v. Department of Transportation*, 2010 WI App 139, ¶ 3; *Falkner* at 894.] More generally, Wisconsin courts have signaled judicial reticence to become too involved in determinations of necessity, emphasizing such determinations as inherently a matter for the Legislature, and even characterizing circuit courts as merely functioning as a "delegate" of the Legislature in cases requiring a judge to make an initial determination of necessity. [See, e.g., *Id.*] Thus, the statutory determination of necessity requirement generally does not tend to operate as a substantial legal barrier to condemnation.

### CONDEMNATIONS BY RAILROAD CORPORATIONS

In Wisconsin, a railroad corporation may exercise the power of eminent domain for "any public purpose authorized by its articles of incorporation." [s. 32.02 (3), Stats.] A railroad may also make its own determination of necessity for the right-of-way of a railroad up to 100 feet in width. [s. 32.07 (2), Stats.] The circuit court in the county in which the property is located must make the determination of necessity for a condemnation of a railroad right-of-way that is wider than 100 feet.

If you have any questions, please feel free to contact me directly at the Legislative Council staff offices.

AH:jal